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COMMENTS

JUDICIAL TENURE IN THE DISTRICT OF COLUMBIA

Independent supervision and review of judicial conduct and reappointment qualifications are generally considered desirable. Almost all states currently utilize some form of tenure council or commission to oversee the activities of their judges. The District of Columbia Commission on Judicial Disabilities and Tenure, first established in 1971, regulates the behavior of local judges. Since the approval of the District of Columbia Charter, the Tenure Commission also figures prominently in the reappointment of the District's judges.

The Tenure Commission has been rather successful in expediting disciplinary matters and reappointments. But experience has also exposed some latent deficiencies in the structure and operation of the Tenure Commission which require careful attention.

Judge Charles W. Halleck resigned from his position on the District of Columbia Superior Court effective July 29, 1977 to return to private practice. Actually Judge Halleck was the first public fatality of the relatively new reappointment procedure for judges in the District of Columbia courts established by Congress under the District of Columbia Home Rule Act.¹ Although the District of Columbia Commission on Judicial Disabilities and Tenure approved Judge Halleck's candidacy by rating him qualified,² a subsequent disciplinary proceeding, also conducted by the Tenure Commission, undoubtedly affected his unsuccessful reappointment attempt.

Recently, most of Judge Halleck's challenges to the Commission's authority and practices were rejected. Judge Halleck filed suit in the United States District Court for the District of Columbia on October 26, 1976 for declaratory and injunctive relief.³ He requested the court to find

1. District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), Pub. L. No. 93-198, §§ 431-34, 87 Stat. 774 (1973). There is some speculation that former Superior Court Judge Harry T. Alexander elected to resign several months after declaring his candidacy for reappointment rather than complete the evaluation initiated by the District of Columbia Commission on Judicial Disabilities and Tenure. Wash. Post, October 27, 1976, § A, at 4, col. 3.

2. The procedures and standards employed by the Tenure Commission are discussed at text accompanying notes 106-17 *infra*.

3. Halleck v. Berliner, 427 F. Supp. 1225 (D.D.C. 1977).

certain portions of the Act unconstitutional, declare the Commission's evaluation of his fitness for duty invalid, and enjoin the Commission's pending disciplinary action.

Judge Thomsen, a federal judge for the District of Maryland was designated by Chief Justice Burger to hear the action filed by Judge Halleck after all the members of the District Court for the District of Columbia disqualified themselves.⁴ Judge Thomsen affirmed the Tenure Commission's actions and denied Judge Halleck's requests.

Despite the apparent constitutional validity of the Tenure Commission's structure and operation, serious problems persist. The precise scope of the Commission's power is unclear; the criteria used to evaluate a judge's conduct are rather subjective; and, most critical in Judge Halleck's case, the Commission cannot assure absolute confidentiality in either its reappointment or disciplinary proceedings.

Under Judge Thomsen's ruling, of course, the absence of strict secrecy will not invalidate the proceedings. In his opinion, Judge Thomsen stated that the Commission did not violate the statutory provision for confidentiality when its Special Counsel failed to require all individuals contacted during the disciplinary investigation to affirm they would not reveal they had been contacted by the Commission.⁵ Realistically, however, the Commission's inability to control the flow of information concerning its investigations and hearings might continue to jeopardize⁶ the reappointment of other judges or impair the effectiveness of the Commission's disciplinary and involuntary retirement functions. Because this problem involves competing interests, it is unclear whether it can ever be resolved satisfactorily.

To assess the potential impact of these weaknesses adequately, this article will summarize both the alternative means of supervising judicial misconduct and the development of tenure commissions throughout the United States. It will also review the origins and functions of the District's Tenure Commission, assess the Commission's performance and potential, and examine Judge Halleck's candidacy for reappointment and the Commission's subsequent disciplinary action.

I. A PROFILE OF JUDICIAL TENURE COMMISSIONS

Few would dispute that regulation of improper judicial conduct is necessary to maintain high standards for the administration of justice⁷

4. *Id.* at 1232.

5. *Id.* at 1243.

6. See notes 167-89 & accompanying text *infra*.

7. Davis, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV.

and nurture public confidence in the judiciary.⁸ Simultaneously, however, the independence of the judiciary must be protected.⁹ Therefore, any acceptable scheme for imposing sanctions must fashion a "balance . . . that removes the obstacles to a justified removal while maintaining adequate safeguards to prevent unnecessary attacks on the judiciary."¹⁰

The traditional methods for removing judges—impeachment, address, concurrent resolution, and recall¹¹—have been subject to valid criticism.

448, 453 (1967); Winter, *Judging the Judges—The Techniques of Judicial Discipline*, 41 MISS. L. J. 1, 9 (1970).

8. "It is the thesis here that the principal policy objective of a procedure for dealing with judicial misconduct as such . . . is to insure society's confidence in the formal system of dispute-resolution." Braithwaite, *Judicial Misconduct and How Four States Deal With It*, 35 L. & CONTEMP. PROB. 151, 153 (1970). See also W. BRAITHWAITE, WHO JUDGES THE JUDGES 9 (1971); *The Discipline and Removal of Judges*, 28 REC. B. A. CITY N.Y. 377, 379 (1973); Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190, 208-09 (1976).

9. Winter, *supra* note 7, at 9.

A major justification for limiting scrutiny of the judiciary for purposes of discipline or removal is the need to preserve judicial independence. Although "judicial independence" has two meanings, in this context it does not refer to the independence of the judiciary as an institution from control by other branches of government, but to the right of the individual judge to exercise his office within his view of the law, without fear of repercussions merely because of those views. . . . It is generally accepted that judges are not accountable by way of either civil suit or discipline for their official acts, even if clearly erroneous An honest judge, if he were denied the protection of the extrinsic evidence requirement, might become unduly cautious in his work, since he would be subject to discipline based merely upon the inferences to be drawn from an erroneous decision.

Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149, 150-51 (1966).

Actually, both aspects of judicial independence are involved. If either the legislative or executive branch plays a large role in tenure decisions, there is the possibility the judiciary will be subordinated to another branch. Braithwaite, *Judicial Misconduct*, *supra* note 8, at 153 (quoting Illinois Supreme Court Justice Schaefer in *Cusack v. Howlett*, 44 Ill. 2d 233, 237, 254 N.E.2d 506, 508 (1969)).

As a corollary to this analysis, one could conclude that an evaluation of judicial performance which relies on an individual's appellate reversal rate would be unsatisfactory: "[T]he feasibility of using the [reversal] records as a standard of performance is doubtful. Some less respected judges are seldom reversed, because of their slavish adherence to prior law. Good judges, however, often find themselves reversed for attempting new approaches." Note, *supra*, at 152.

10. Davis, *supra* note 7, at 454.

11. Impeachment may be analogized to an indictment in the lower house of the state legislature followed by a trial in the upper house. Address involves a formal demand from the state legislature to the governor requesting the removal of a judge. Concurrent resolution is quite similar. If the required percentage of both legislative houses petition the governor to remove a judge, he must comply. Lastly, some states provide for removal through a recall vote: if a sufficient number of qualified voters petition for a recall, a special election is conducted. Braithwaite, *Judicial Misconduct*, *supra* note 8, at 153 n.7.

Apparently none of the mechanisms is invoked very often.¹² Since the legislature is the protagonist in three of these scenarios, partisan politics might play a substantial role.¹³ Impeachment, available in forty-six states as of 1970, is also cited for the time and funds required to complete the process¹⁴ and its general ineffectiveness.¹⁵ Furthermore these plans provide little flexibility to select sanctions appropriate to the individual conduct involved.¹⁶

Perhaps in response to the difficulties inherent in these other systems, many states during the past several years have created a new apparatus, the tenure commission, to supplement the older forms.¹⁷ The general reaction to these innovations has been favorable and the experiences encouraging.¹⁸

At this juncture, tenure and disability mechanisms must be distinguished from merit selection devices. Although both are intended to improve the quality of the bench, the scope of each agency is quite different. A judicial selection procedure should guarantee the candidate's professional qualifications at the time of his appointment. On the other hand, a tenure mechanism assures the expeditious discipline or retirement of judges who engage in misconduct or develop disabilities while in office.¹⁹

Specific features of the different disciplinary devices vary greatly between jurisdictions.²⁰ Usually, however, the tenure and disability

12. W. BRAITHWAITE, WHO JUDGES THE JUDGES 13 (1971); Braithwaite, *Judicial Misconduct* *supra* note 8, at 153-54. In the federal judiciary system, in which impeachment has been the exclusive, and perhaps the only, constitutional method of removal (U.S. CONST. art. 2, § 4), 56 judges have been investigated in the history of the nation. Eight of these judges were impeached, eight were censured, and seventeen resigned. J. BORKIN, *THE CORRUPT JUDGE*, 213-58 (1962). The campaign to impeach Justice William O. Douglas occurred after the publication of Mr. Borkin's book.

13. W. BRAITHWAITE, WHO JUDGES THE JUDGES 9 (1971).

14. Braithwaite, *Judicial Misconduct*, *supra* note 8, at 154.

15. Comment, *supra* note 8, at 195-97.

16. 54 N.C.L. REV. 1074, 1079 (1976).

17. According to one tabulation, between 1960 and 1974, approximately 36 jurisdictions implemented a special commission to handle judicial disciplinary matters. Frankel, *Who Judges the Judges?*, TRIAL, Jan./Feb. 1975, at 52. The District of Columbia Commission on Judicial Disabilities and Tenure reported that by 1976, 41 states, in addition to the District, had commission plans. ANNUAL REPORT OF THE DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE (April 1975-September 1976), at 1 (1976) [hereinafter cited as ANNUAL REPORT I].

18. See Frankel, *supra* note 17; Comment, *supra* note 8; Note, *Discipline of Judges in Maryland*, 34 MD. L. REV. 612 (1974); 54 N.C.L. REV. 1074 (1976).

19. W. BRAITHWAITE, WHO JUDGES THE JUDGES 11 (1971).

20. For a summary of each program in existence during 1972, including the derivation and scope of the disciplinary power, the composition of the agency, procedures, sanctions, and recent court decisions, see NATIONAL CONFERENCES OF JUDICIAL DISABILITIES

forum receives complaints directed against any judge within its jurisdiction. The commission will investigate the charge to determine whether it should be dismissed or if formal proceedings should be instituted. If the panel members conclude that there is some basis for the allegation, the judge will be informed and given an opportunity to make an informal reply. Some judges prefer to retire or resign at this stage. If the judge's response is satisfactory, the board will close the case; if not, the commission will hold a hearing and issue its decision.²¹

Regardless of the particular form adopted by each state, certain elements seem especially desirable, if not compulsory. Adequate publicity, a heterogeneous commission membership, a full-time administrative staff, established behavioral standards and commission procedures, a wide scope of commission authority, and confidential proceedings are items which should be incorporated into most judicial tenure systems.

Since these agencies rely heavily on input from the bar and private individuals, the commission must be accessible.²² To achieve this goal, the public must be aware of the commission and its functions. Similarly, information reflecting the commission's activities for each year should be readily available. Otherwise it will be impossible to assess the commission's work accurately and the public might suspect that the commission is ineffective.²³ Additionally, unless informal procedures for

AND REMOVAL COMMISSIONS, JUDICIAL DISABILITIES AND REMOVAL COMMISSIONS, COURTS AND PROCEDURES (1972) [hereinafter cited as NATIONAL CONFERENCES].

21. Most states have created independent commissions which conduct investigations and hearings or delegate this power to special masters but can only recommend action to the state supreme court which selects the proper sanction. *See, e.g.*, ALASKA STAT. § 22.30.070; CAL. CONST. art. 6, §§ 8, 18; FLA. CONST. art. 5, § 17A, para. 3; IDAHO CODE §§ 1-2101 to 2104 (Supp. 1977); LA. CONST. art. 5, § 25; MICH. CONST. art. VI, § 30; N.M. CONST. art. VI, § 32; PA. CONST. art. 5, § 18; TEX. CONST. art. 5, § 1-a; UTAH CODE ANN. § 49-7a-38 (Supp. 1975). Other states vest the entire process in the judiciary. *See, e.g.*, DEL. CONST. art. IV, § 37; N.J. STAT. ANN. §§ 2A:1B-2 to 1B-11 (West Supp. 1977); N.Y. CONST. art. 6, § 22b.

22. W. BRAITHWAITE, WHO JUDGES THE JUDGES 94 (1971); Winter, *supra* note 7, at 12.

23. Gasperini, Anderson & McGinley, *Judicial Removal in New York: A New Look*, 40 FORDHAM L. REV. 1, 24 (1971). Most commissions' proceedings are confidential to a certain degree and usually no identities are revealed in the yearly report. Unfortunately, the publication of statistics regarding the number of complaints and their disposition might place every retirement or resignation in doubt; often the public will have no way of knowing whether a specific retirement or resignation was "legitimate" or the result of commission activity. Nevertheless, some analysis of a commission's performance is necessary to demonstrate its utility; the possibility that people will speculate over the departure of certain judges should not inhibit the circulation of this data. Moreover, in most jurisdictions the proceedings lose their confidential nature once the Commission files a recommendation with the state supreme court. *See, e.g.*, FLA. CONST. art. 5, § 17A; IDAHO CODE § 1-2103 (Supp. 1976); LA. CONST. art. 5, § 25(D); N.M. CONST. art. VI, § 32; COLO. CONST. art. VI, § 23(3)(d); DEL. CONST. art. IV, § 37.

filing complaints exist, individuals will be deterred from participating.²⁴

The membership of judges, lawyers, and laymen on the commission seems obligatory.²⁵ The public, which has a definite interest in the judiciary and the commission's operation, should be represented. Because of their close contact with the court system, judges and attorneys would contribute invaluable knowledge to any deliberations.²⁶ Moreover, a heterogeneous membership would safeguard a commission's autonomy and impartiality since all members would not be subject to the same external pressures.²⁷

For a balanced perspective, perhaps each group should be represented equally on the commission. Some writers, however, favor proposals in which judges constitute a majority of the commissioners. Apparently there is some apprehension that unless judges are in the majority, inappropriate standards of conduct might be employed²⁸ which may undermine the independence of the judiciary.²⁹

But the commentators who advocate the position that tenure commissions should have a majority of judges offer no evidence to support their fears.³⁰ One might well doubt the commission's zeal and ability to regulate judicial conduct if most of its members are judges.³¹ In any event, several jurisdictions, including the District of Columbia, do not provide for a predomination of judges on the tenure commission.³²

A permanent full-time staff to assist the commissioners is necessary to promote the plan's effectiveness. These employees handle the daily

24. W. BRAITHWAITE, WHO JUDGES THE JUDGES 163 (1971).

25. This discussion is not pertinent in jurisdictions in which the disciplinary authority is held solely by the judiciary, such as New Jersey or Wisconsin. However, a disciplinary tribunal composed entirely of judges is less desirable, since critics could easily, and perhaps unfairly, question the impartiality of the commission's members.

26. Cady, *Court Modernization: Retrospective, Prospective and Perspective*, 6 SUFFOLK L. REV. 815, 832, 834 (1972).

27. Frankel, *Judicial Ethics and Discipline of the 1970's*, 54 JUDICATURE 18, 19 (1970); Note, *supra* note 9, at 183.

28. See Note, *supra* note 9, at 183. In discussing the California Judicial Qualifications Commission, the author asserts: "More important, the Commission's composition tends to insure that the standards applied are related to expectations of how judges should behave. The majority of its members are judges, able to present a knowledgeable picture to the other members of what standards may reasonably be applied to the judiciary." *Id.*

29. Winter, *supra* note 7, at 11.

30. See Winter, *supra* note 7; Note, *supra* note 9.

31. See Braithwaite, *Judicial Misconduct*, *supra* note 8, at 153 (quoting Illinois Supreme Court Justice Schaefer in *Cusack v. Howlett*, 44 Ill. 2d 233, 240, 254 N.E.2d 506, 509 (1969)); Comment, *supra* note 8, at 209.

32. Florida, Idaho, Illinois, Indiana, Michigan, Missouri, New Mexico, Texas, and Utah are among the states which do not have a majority of judges on their judicial disciplinary commissions. ANNUAL REPORT 1, *supra* note 17.

administrative work and act as a liaison between the commission and the public.³³

An effective program also requires continuity; procedures and ethical standards are mandated.³⁴ Procedural rules would facilitate the disposition of a complaint and foster consistent treatment of individual cases. Meanwhile, behavioral guidelines would furnish a model of proper judicial conduct.

The formulation of published standards serves many additional purposes. First, a judge would know what principles the commission will use to evaluate his behavior. Second, attorneys and potential witnesses will be aware of the criteria necessary to sustain a complaint.³⁵ Third, established criteria would aid the commission in adjudicating each case; once standards have been adopted, the commissioners' function would be limited to determining whether an individual has violated the rules of conduct and, if so, imposing an appropriate penalty.³⁶

Judicial misconduct falls into several categories which range from felony convictions to courtroom discourtesy.³⁷ The majority of cases, however, involve "habitual tardiness, short hours, long vacations, and extreme rudeness to lawyers, litigants, and witnesses . . ."³⁸ Much of this misconduct probably does not warrant removal; nonetheless, it should not be condoned.³⁹ Therefore a tenure commission should have

33. W. BRAITHWAITE, WHO JUDGES THE JUDGES 163 (1971); Winter, *supra* note 7, at 12; Comment, *supra* note 8, at 209.

34. Winter, *supra* note 7, at 11-12.

35. It is important that standards of judicial misconduct be set, and be known by three classes of persons. Of course, judges should know by what standards their conduct will be judged, both in fairness to them and to reduce the required number of disciplinary proceedings. Witnesses at disciplinary proceedings who could be adversely affected in the event of the judge's return to the bench might be more willing to testify if they were aware of standards of conduct. Attorneys, also, should know which acts of judicial misconduct are proscribed, so that they will not incur a judge's resentment for making an unactionable complaint.

Note, *supra* note 9, at 195.

36. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 417; Note, *supra* note 18, at 619. Martineau views the ABA's Code of Judicial Conduct as supplying definite and enforceable ethical criteria. Martineau, *supra*, at 418-19.

37. W. BRAITHWAITE, WHO JUDGES THE JUDGES 161 (1971).

An analysis of the provisions of the various states that have one or the other [judicial courts or commissions on tenure] reveals that the normal bases for disciplinary action include willful neglect of duty, persistent and willful failure to perform the duties of the court, intemperate use of alcohol or drugs, conviction of a felony or a crime involving moral turpitude, persistent violation of judicial ethics, and gross impartiality on the court.

Winter, *supra* note 7, at 11.

38. W. BRAITHWAITE, WHO JUDGES THE JUDGES 5 (1971).

39. "Judicial bad manners is a critical problem which renders a disciplinary technique

sufficient flexibility to deal with the varying degrees of potential misconduct. Ideally, the commission should be empowered to issue informal, private reprimands as well as order public censures and removals.⁴⁰

Perhaps the key to a tenure system's potential effectiveness, however, is the confidentiality of the proceedings. The parties must be promised some degree of anonymity. Otherwise, attorneys and litigants, fearing reprisals from the judge, will hesitate to submit complaints or participate as witnesses in commission proceedings.⁴¹ The damaging effect of this attitude on the commission's operations is readily apparent. To alleviate this apprehension, communications with the commission should be privileged.⁴²

A confidentiality rule would accomplish other valuable goals. It would curtail the circulation of frivolous, unproven, and false accusations,⁴³ prompt some judges to acknowledge any charges voluntarily,⁴⁴ contribute to the use of informal disciplinary methods for minor infractions,⁴⁵ and allow judges to resign or retire without facing an embarrassing inquiry.⁴⁶

Some observers might well object to secret proceedings and question whether the Commissioners are being thorough or effective.⁴⁷ Others

vital. Although circumstances will not normally permit or justify removal, the public needs a tool to assert the standards of decency." Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117, 1123 (1966) (footnotes omitted).

40. Many commentators support this position. W. BRAITHWAITE, WHO JUDGES THE JUDGES 161 (1971); NATIONAL CONFERENCES, *supra* note 20, at xviii; Frankel, *supra* note 39, at 1129-30.

A study of commission actions in one state indicated that removals usually occur when "conviction of a felony, gross misconduct outside the courthouse, or incompetence in performing judicial duties" is involved. Note, *supra* note 18, at 626. Conversely, censure is ordinarily invoked when "isolated lapses of personal or professional conduct and lack of proper judicial temperament" exist. *Id.* at 628. From this survey, the author concluded:

It is very difficult to mark the boundary between conduct meriting removal and conduct meriting censure. The line lies more in the degree of misconduct, rather than its nature, although there is a greater tendency to remove a judge for criminal actions or conduct directly affecting the performance of judicial duties.

Id. at 632.

41. W. BRAITHWAITE, WHO JUDGES THE JUDGES 163 (1971); O. PHILLIPS & P. MCCOY, CONDUCT OF JUDGES AND LAWYERS 212 (1952).

42. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEXAS L. REV. 629, 712-13 (1972).

43. W. BRAITHWAITE, WHO JUDGES THE JUDGES 94, 162 (1971).

44. Alschuler, *supra* note 42, at 713.

45. W. BRAITHWAITE, WHO JUDGES THE JUDGES 162 (1971).

46. *Id.* at 161; Alschuler, *supra* note 42, at 713; Braithwaite, *Judicial Misconduct*, *supra* note 8, at 168.

47. Alschuler, *supra* note 42, at 708-13. The author raised several possible exceptions to this policy but concluded the benefits derived from a confidential proceeding outweigh the public's right of access to this information. *Id.*

believe the record should be opened once the commission proposes punishment.⁴⁸ Despite this disagreement, it is clear that without some assurance to complainants, witnesses, lawyers, and judges that their identities will remain undisclosed whenever possible, the commission will not receive the cooperation necessary to fulfill its role in improving the caliber of the judiciary.

II. THE FIRST DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE

Congress established the original District of Columbia Commission on Judicial Disabilities and Tenure when it enacted the District of Columbia Court Reform and Criminal Procedure Act of 1970.⁴⁹ This legislation evolved from a proposal, designated as the District of Columbia Court Reorganization Act of 1969, submitted by then Attorney General John Mitchell on July 11, 1969, and introduced as S. 2601.⁵⁰ The recommendation specifically provided for a District of Columbia Commission on Disabilities and Tenure.⁵¹ At the same time, the House of Representatives was considering legislation, H.R. 16196, which encompassed many aspects of S. 2601 and a revision of the District's criminal procedure.⁵²

According to the House Report which accompanied H.R. 16196:

The purpose of this bill is to give to the people of Washington, its citizens and those temporarily sojourning here, as well as the millions of visitors who come here annually, some measure of surcease from the evergrowing criminal element which too long, outrageously and indefensibly, has been a threat to life, limb and property in the District of Columbia.⁵³

48. Note, *supra* note 18, at 632; see note 23 *supra*. The practice of California's Judicial Qualifications Commission reflects this philosophy. W. BRAITHWAITE, WHO JUDGES THE JUDGES 94 (1971).

49. Pub. L. No. 91-358, §§ 111-11-1521 to 111-11-1530, 84 Stat. 473 (codified at D.C. Code §§ 11-1521 to 1530 (1973) (amended 1975)). Under the United States Constitution, Congress has plenary legislative power for the District of Columbia. U.S. CONST. art. I, § 8.

50. Holloman, *The Judicial Reform Act: History, Analysis and Comment*, 35 LAW & CONTEMP. PROB. 128, 139 (1970).

51. *Id.* Deputy Attorney General Richard Kleindienst later iterated the Nixon administration's support for a tenure commission when he spoke at a hearing conducted by the Senate's District of Columbia Committee and the Judicial Subcommittee on Improvements in Judicial Machinery. *Id.*

52. H.R. 16196, 91st Cong., 2d Sess. (1969).

53. H.R. REP. NO. 907, 91st Cong., 2d Sess. 3 (1970) [hereinafter cited as H.R. REP. 91-907]. Both the Senate Report on S. 2601 and the House Report on H.R. 16196 reflected extreme concern over the District's rising crime rate and the inability of the existing court system to cope with the situation. H.R. REP. 91-907, *supra*, at 3-4, 14-22; S. REP. NO. 405, 91st Cong., 1st Sess. 2-3 (1969) [hereinafter cited as S. REP. 91-405].

Although these bills were aimed primarily at adjusting the jurisdiction of the local courts, improving court management, and modifying the District's criminal procedures,⁵⁴ regulation of judicial misconduct was regarded as a critical element in the scheme.⁵⁵

In explaining the principal features of S. 2601, the Senate Committee recognized that techniques of judicial selection are imperfect and some judges become unfit for office during their tenure.⁵⁶ The Committee also acknowledged that the contemporary provision for the removal of local judges was inadequate.⁵⁷ Under the existing statute, removal of judges sitting on the District of Columbia Court of General Sessions or the Court of Appeals could only be effected in accordance with the constitutional requisites applicable to federal judges.⁵⁸ Therefore, aside from a ten year tenure, District of Columbia judges held office during good behavior,⁵⁹ but could be removed through impeachment and conviction of treason, bribery, or other high crimes and misdemeanors.⁶⁰ Essentially then, the creation of a tenure commission was viewed as one method to promote judicial competence.⁶¹

54. H.R. REP. 91-907, *supra* note 53, at 23-25, 42-122. Preceding the Court Reform Act, the federal courts for the District of Columbia had original and appellate jurisdiction, which was either exclusive or concurrent, over many local matters. Pub. L. No. 88-241, §§ 11-321, 11-521, 11-522, and 11-523, 77 Stat. 479, 482-83 (1963). In its report the Senate Committee on the District of Columbia noted it:

was mindful of the anomaly inherent in burdening a Federal district court with sole general jurisdiction over the full panoply of local legal matters. The burden is acute in the District of Columbia, the seat of the Federal Government, where, in the absence of inordinately crowded dockets (both civil and criminal), a substantial and greater quantum of genuinely Federal litigation might best and conveniently be brought. Yet, at present the median time for civil jury trial in the U.S. District Court for the District of Columbia is nearly double the median for Federal district courts nationwide. In recent years as many as 12 out of 14 judges of the Federal court in the National Capital have been assigned full time to the trial of local felony offenses.

S. REP. 91-405, *supra* note 53, at 3. As finally passed, S. 2601 shifted jurisdiction over local litigation to the District of Columbia Superior Court and Court of Appeals. D.C. Code §§ 11-721, 11-921 to 923 (1973) The jurisdiction of the federal courts in the District now accords with that of other United States courts in the country. *Id.* §§ 11-301 to 503.

55. H.R. REP. 91-907, *supra* note 53, at 38-39.

56. S. REP. 91-405, *supra* note 53, at 10.

57. *Id.* at 11.

58. See Pub. L. No. 88-241, §§ 11-902(f), 77 Stat. 487 (1963).

59. U.S. CONST. art. III, § 1.

60. *Id.*, art. II, § 4.

61. H.R. REP. 91-907, *supra* note 53, at 39; S. REP. 91-405, *supra* note 53, at 8, 25-26. The Senate Committee commented:

To maintain public confidence in the courts and to assure a mechanism to deal with unfit judges, there is a need for the creation of a commission to effect the removal of unfit judges and the retirement of those who are disabled. Such a commission is an essential ingredient of a sound court structure.

S. 2601, popularly known as the Court Reform Act, was finally approved by both houses and became effective February 11, 1971.⁶² Composed of five members and three alternates,⁶³ the Commission was given the authority "to suspend, retire, or remove a judge of a District of Columbia court" pursuant to the standards and procedures enunciated in the Act,⁶⁴ ultimately subject to judicial review by a special court convened by the Chief Justice of the United States.⁶⁵

The first Tenure Commission existed for almost four years. In that period, it published one set of rules and regulations,⁶⁶ received approximately forty-nine complaints, and publicly censured one judge.⁶⁷ Except to announce the public censure, the first Commission never released any information regarding its activities.⁶⁸ Since the Commission's files are confidential,⁶⁹ there is little indication how the remaining forty-eight complaints were dispatched.⁷⁰ As noted earlier, failure to provide any material relating to a tenure commission's work casts significant doubt on its credibility and competence. Without an accounting, the

Id. at 10. The Committee found considerable precedent for a tenure commission in other jurisdictions which had experimented with alternative disciplinary systems, and noted their general success. *Id.* at 10-11.

As voted out of committee, S. 2601 proposed an advisory committee on judicial selection whose members would recommend candidates for judicial vacancies. 116 CONG. REC. 8925-26 (1970). This section was intended to promote merit selection of judges. S. REP. 91-405, *supra* note 53, at 8, 26-27. Originally S. 2601 also contemplated an initial four year trial period followed by good behavior tenure if the judge were reconfirmed. 116 CONG. REC. 8925 (1970). *See also* S. REP. 91-405, *supra* note 53, at 8, 25-26. The House Committee on the District of Columbia objected to both plans and neither section was included in the final bill. H.R. REP. 91-907, *supra* note 53, at 38-39.

62. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473. For a synopsis of the bill's history in Congress, see 1970 D.C. Code Legis. & Admin. Serv. 398.

63. D.C. Code § 11-1522 (1973) (amended 1973).

64. *Id.* § 11-1521.

65. *Id.* § 11-1529. The special court's scope of review is similar to that employed by an appellate court examining agency action.

66. 17 D.C. Reg. 22,694 (May 3, 1971). In the Court Reform Act, Congress granted rule-making authority to the Commission. D.C. Code § 11-1525 (1973) (amended 1973). The regulations which the Commission promulgated determined Commission procedures for investigating, prosecuting, and adjudicating all complaints.

67. Phone conversations with Cathae Hudgins, Executive Assistant to the current Commission (Sept. 12, 15 & 16, 1977).

68. The information presented here was collated by Ms. Hudgins from records maintained by the previous Commission.

69. D.C. Code § 11-1528 (1973) (amended 1973).

70. The one complaint which resulted in formal action by the Commission involved allegations that a judge's conduct was prejudicial to the administration of justice and detrimental to the judicial office. The Commission's investigation concentrated on the transcripts of several cases heard by the respondent judge between February 19, 1971, and August 12, 1971. Many of the judge's comments demonstrated extreme discourtesy to

strength of the Commission's performance from 1971 to 1974 cannot be determined.⁷¹

III. HOME RULE AND THE DISTRICT'S TENURE COMMISSION

The Tenure Commission was reconstituted under the District of Columbia Self-Government and Governmental Reorganization Act.⁷² According to the "Statement of Purposes" included in the legislation, the Act was intended to grant the District many of the powers and responsibilities normally associated with a state.⁷³ This attitude, and the

witnesses, litigants, and attorneys, interference with the judicial process, criticism of other judges, and impatience with the administration of justice. The Commission concluded that the judge's actions warranted public censure because the evidence reflected a disregard for both the judicial standards enunciated by the courts and the Canons of Judicial Ethics. *In re* Harry T. Alexander, Formal Case No. 1-71 at 27-30 (Commission on Judicial Disabilities & Tenure, February 14, 1972).

In determining that the judge's behavior did not justify a harsher penalty, the Commissioners cited certain mitigating circumstances:

The Commission recognizes that before going on the Bench, Judge Alexander rendered important service as a member of the Bar, and that since going on the Bench, in other instances not here involved, he has rendered conscientious and effective judicial service. We do not believe, therefore, that his conduct as detailed herein is such as to require us to proceed beyond the issuance of a public censure.

Id. at 30.

71. See note 23 & accompanying text *supra*. In its opinion and order regarding Judge Alexander, the Commission gave some indication of its informal method for disposing of minor complaints; apparently, private admonitions were issued on several occasions during the Commission's first year. The opinion also suggested that repeated offenses would be handled more severely:

The conduct of some other judges in our Superior Court has been the subject of complaints which also alleged intemperate and injudicial conduct. These complaints have been and are presently the subject of investigation and, in some cases, warnings by the Commission have been issued to the judge concerned. Judge Alexander, however, has exhibited unacceptable conduct extending over such a long period of time that a private resolution of the present complaint is deemed inappropriate.

In re Alexander, Formal Case No. 1-71 at 30.

Since no other judges received a public reproof, one might infer that the informal approach was remarkably effective. This barometer, however, might prove inaccurate, since the opinion reflected only the Commission's position as it entered its second year and it is possible that the policy was modified over the next three years. Without access to more detailed statistics or the files, however, this assumption cannot be verified or refuted.

72. Pub. L. No. 93-198, §§ 431(d)-(g), 432-433, 87 Stat. 774 (1973). The Home Rule Act was signed by President Nixon on December 24, 1973, but Title IV regarding the judiciary did not take effect until January 2, 1975, after approval by the District of Columbia voters in a charter referendum. *Id.* § 771(c).

73. The Statement of Purposes noted in pertinent part:

[T]he intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the

continuing congressional interest in an independent local judiciary, were manifested in the decision to establish a Judicial Nomination Commission⁷⁴ and to retain the Commission on Judicial Disabilities and Tenure.⁷⁵

inhabitants of the District of Columbia powers of local self-government; to modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

Id. § 102(a).

74. Prior to the Home Rule Act, all judges of the District of Columbia courts were nominated by the President and appointed with Senate approval. D.C. Code § 11-1501(a) (1973). After the enactment of the Court Reform Act, *see* note 62 *supra*, the United States Attorney General commissioned the ABA's Standing Committee on Federal Judiciary to render advisory evaluations of nominees to the District of Columbia bench. ANNUAL REPORT I, *supra* note 17, at 4.

The Judicial Nomination Commission is now empowered to select candidates to fill impending or existing vacancies. The seven members are required to submit a list of three nominees to the President for appointment upon the advice and consent of the Senate. If the President does not select any of the candidates suggested by the Nomination Commission within sixty days, the Commissioners will nominate one of the persons on the roster, again subject to Senate approval. Home Rule Act, Pub. L. No. 93-198, § 434(d), 87 Stat. 774 (1973).

The history of these provisions is quite interesting. Earlier versions of both the House and Senate bills conferred the appointment power on the mayor, contingent upon Senate or City Council approval. COMMITTEE ON THE DISTRICT OF COLUMBIA, LEGISLATIVE HISTORY OF DISTRICT OF COLUMBIA SELF-GOVERNMENT & GOVERNMENTAL REORGANIZATION ACT, S. 1435, 93d Cong., 1st Sess. 423, 515 (1973).

Some Congressmen, who favored presidential appointment, feared that judicial independence would be threatened if local officials were given this authority:

The independence built into the present system could be destroyed by putting the local judiciary in a position of dependence—for reappointment and even possibly for adequate funding—on the very same officials they have a legal responsibility to oversee. I much prefer the present system which provides great distance in the appointive process between the selecting and confirming entities on the one hand and the judges and decisions they have to render on the other.

119 CONG. REC. 33377 (1973) (remarks of Rep. Harsha). For further comments of Rep. Harsha, *see* 119 CONG. REC. 33635-36 (1973).

Although this position eventually prevailed, one might well question its logic. Rep. Harsha's conclusion is premised on the comparison he made between the District and other United States cities. *Id.* at 33377. It might, however, be more apt to follow Representative Mann's view: "Any analogy with the judicial appointment process operative in other municipalities would not be appropriate inasmuch as the local court system in the District of Columbia is clearly more analogous to a [s]tate court structure than to a municipal court structure. . . ." *Id.* at 33388.

All appointed judges are potentially subject to political pressures and it is not reasonable to assume that the District's judges will be any more susceptible to these influences, especially when the appointment and reappointment procedures give the executive such limited discretion. If one equates the District's court structure with those of the different states, the federal government's participation in the appointment of non-federal judges is anomalous and unjustified. Despite this controversy over which executive should nominate the judges, it is clear that merit selection was a prime motive for the creation of the Judicial Nomination Commission. *Id.* at 42037-38.

75. To further insulate the judiciary, the Home Rule Act prohibits the City Council

The former Tenure Commission had five members: three appointed by the President, one by the Commissioner of the District of Columbia and one by the Chief Judge of the District Court for the District of Columbia. Only three of the appointees were required to be District residents.⁷⁶

In comparison, the new Tenure Commission has seven members who serve staggered terms and are compensated for their services at a GS-18 rate.⁷⁷ Of the seven members, one is appointed by the President of the United States, two by the Board of Governors for the District of Columbia Bar, two by the mayor, one by the City Council, and one by the Chief Judge of the United States District Court for the District of Columbia. All members serve for six years, except the presidential appointee who only has a five year tenure. The person selected by the Chief Judge must be a retired or active federal judge and will not receive any additional compensation. All members must be United States citizens. At least two of the Commissioners, and possibly four, will be laypersons. Appointees who are attorneys must satisfy the qualifications set for District of Columbia judges. Moreover, with the exception of the member designated by the Chief Judge of the district court, Commission members cannot be employed by the District of Columbia government, in an executive or military agency, or in the legislative or judicial branch of the federal government.⁷⁸

The impact of the home rule philosophy is immediately noticeable. Presidential influence over the Tenure Commission is greatly diminished since the President selects only one Commissioner. Meanwhile local interests receive greater representation. The Judicial Nomination and Tenure Commissions, which share primary responsibility for insuring a highly qualified and reputable bench, are comprised of District residents only. Moreover, a majority of the Commissioners are appointed by local parties.

Under the Home Rule Act, the Commission retained its former authority but was also assigned the task of evaluating the performance of judges seeking reappointment.⁷⁹ The statutory standards for imposing

from amending sections of the Charter which affect the judges, Pub. L. No. 93-198, § 303(a), 87 Stat. 774 (1973), or altering any portion of title 11 of the D.C. Code which pertains to the organization, administration, and jurisdiction of the local courts. *Id.* § 602(a)(4). These safeguards should operate in conjunction to guarantee a very high degree of judicial integrity and independence.

76. D.C. Code § 11-1522 (1973). The old Commission also had three alternates, selected respectively by the President, Commissioner, and Chief Judge. *Id.*

77. Home Rule Act, Pub. L. No. 93-198, §§ 431(d)-(f), 434 (a)-(c), 87 Stat. 774 (1973).

78. *Id.* §§ 431(e)(1)(C). Similar requirements exist regarding the judicial Nomination Commission. *See id.* § 434.

79. *Id.* §§ 432, 433(c). For further discussion of the reappointment functions, see

sanctions or involuntary retirement are identical to those established by the Court Reform Act in 1970.⁸⁰ The grounds for removal are conviction of a felony⁸¹ or other behavior which the Commissioners have determined constitutes: "(A) willful misconduct in office, (B) willful and persistent failure to perform judicial duties, or (C) any other conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute."⁸² Involuntary retirement is mandated once the Commission concludes that a physical or mental disability is impairing a judge's performance.⁸³

Since both removal and involuntary retirement orders are subject to judicial review by a special court,⁸⁴ no judge will be disciplined or retired until either the Commission's ruling is affirmed or the time for filing an appeal has lapsed. Nevertheless, the Commission is obligated to suspend a judge pending the final judgment of a felony conviction or court review of the Commission's action.⁸⁵ Similarly, until all appeals have been completed, the Commissioners must suspend any judge for whom they have filed an involuntary retirement order.⁸⁶ Lastly, the Commissioners

text accompanying notes 106-23 *infra*.

The legislative history of the Home Rule Act contains little discussion of the Commission's existing disciplinary authority. Apparently, Congress readily accepted this function and there was no need for renewed debate. One Congressman, however, commented favorably on the Tenure Commission's disciplinary role:

A momentous contribution of the Court Reorganization Act of 1970 was the establishment of the District of Columbia Commission on Judicial Disabilities and Tenure. The Tenure Commission acts as guardian of the integrity and propriety of the local bench with such basic functions as oversight, persuasion, and formal determination—in connection with the ultimate duties of removal and involuntary retirement.

119 CONG. REC. 33388 (1973) (remarks of Rep. Mann).

80. Compare D.C. Code § 11-1526 (1973) with Pub. L. No. 93-198, § 432, 87 Stat. 774 (1973).

81. *Id.* § 432(a)(1).

82. *Id.* § 432(a)(2). For an analysis of these standards, see text accompanying notes 156-61 *infra*.

83. Pub. L. No. 93-198, § 432(b), 87 Stat. 774 (1973).

84. D.C. Code § 11-1529 (1973). The provision for judicial review was actually implemented under the Court Reform Act, and remains valid since § 718(a) of the Home Rule Act retains all portions of the 1970 legislation which are compatible with the later Act. The Commission has construed this section to include procedural aspects outlined in § 11-1527, confidentiality requirements set forth in § 11-1528, judicial review in § 11-1529, the Commission's rule-making power in § 11-1525(a), and the filing of financial statements by judges in § 11-1530. 22 D.C. Reg. 2199, 2199-2200 (Nov. 4, 1975).

85. Pub. L. No. 93-198, § 432(c)(1), 87 Stat. 774 (1973). "If the conviction is reversed or the order of removal is set aside, the judge shall be reinstated and shall recover his salary and all rights and privileges of his office." *Id.*

86. *Id.* § 432(c)(2). The judge will receive his retirement benefits during the suspension. "If the order of involuntary retirement is set aside, the judge shall be reinstated and shall recover his judicial salary less any retirement salary received and shall be entitled to all the rights and privileges of his office." *Id.*

have the discretion to suspend a judge, with salary, once they have prescribed a hearing for his retirement or removal.⁸⁷

As previously indicated, most judicial indiscretions probably do not warrant removal. Instead, a formal reprimand should suffice.⁸⁸ Although the Home Rule Act mentions only removal and ancillary suspension as a remedy for improper judicial conduct, the Commissioners contend they have the implied authority to levy a reprimand in lieu of removal. This interpretation is premised on the principle that the greater power encompasses the lesser.⁸⁹ The Commission's position was sustained by Judge Thomsen in *Halleck v. Berliner*.⁹⁰

There are certain procedures which the Commission must follow once a complaint is filed.⁹¹ Basically, the statute delineates the Commission's responsibilities to the judge during the course of an investigation, hearing, and adjudication.⁹² This section also stipulates the treatment of witnesses and evidence throughout the proceedings.⁹³ On November 4, 1975, the Commission promulgated a set of rules and regulations to govern its disciplinary and involuntary retirement functions.⁹⁴ These regulations operate to augment and clarify the procedures outlined in the legislation.

The Commission is authorized to dismiss complaints and investigate those allegations which appear to have some basis. The regulations signify that the Commission may undertake an initial probe to ascertain whether the complaint should be pursued and proceed with whatever additional investigation is necessary. If the Commission determines that a formal proceeding is justified, the judge will be notified.⁹⁵ The Commission's *Annual Report* I describes a more elaborate and flexible structure which includes communication with the judge before the Notice of Formal Proceeding has been issued and opportunities for an informal resolution of the case at any time.⁹⁶

87. *Id.* § 432(c)(3).

88. See notes 37-40 & accompanying text *supra*.

89. 22 D.C. Reg. 2199, 2201 (Nov. 4, 1975); ANNUAL REPORT I, *supra* note 17, at 2. Apparently the original Commission believed it had the same power under the Court Reform Act. See *In re Alexander*, Formal Case No. 1-71 at 30-31 (Commission on Judicial Disabilities & Tenure, Feb. 14, 1972).

90. 427 F. Supp. 1225, 1245-47 (D.D.C. 1977); see text accompanying notes 4 & 5 *supra*.

91. D.C. Code § 11-1527 (1973). See note 84 *supra*.

92. D.C. Code § 11-1527(a),(b) (1973).

93. *Id.* § 11-1527(c),(d),(e).

94. While characterized as amending the Commission's rules and regulations, these provisions essentially supersede those published by the former Commission. Compare 22 D.C. Reg. 2199, 2199-218 (Nov. 4, 1975) with 17 D.C. Reg. 22,694, 22,711 (May 3, 1971).

95. 22 D.C. Reg. 2199, 2210-12 (Nov. 4, 1975).

96. ANNUAL REPORT I, *supra* note 17, at 3.

Under section 111 of the Court Reform Act, the Commissioners cannot order an involuntary retirement or removal without first conducting a hearing.⁹⁷ A reprimand, however, may be issued without this requirement if the judge has relinquished his right to a hearing.⁹⁸ The respondent judge must receive advance notice of the hearing and the basis for the inquiry. Moreover, the judge is entitled to attend all hearings relating to his conduct, engage counsel, submit evidence, and confront adverse witnesses.⁹⁹ The Commission must maintain a record of any hearing and furnish the respondent with a copy.¹⁰⁰ The members are required to prepare their findings within ninety days of the hearing. If the Commission decides to remove or retire the judge, an appropriate order must be filed with the District of Columbia Court of Appeals and the Commission must contact the respondent, the chief judge of his court, and the President.¹⁰¹ The judge may appeal any order rendered by the Commission to a federal three-judge panel selected by the Chief Justice.¹⁰²

During investigations and hearings, the Commission may allow for discovery and the attendance or deposition of witnesses. The Commission is also empowered to grant transactional immunity to witnesses who invoke their right against self-incrimination and refuse to testify.¹⁰³ The Commission may petition the district court for an order compelling both discovery and the appearance of witnesses who will be compensated for their time.¹⁰⁴

97. D.C. Code § 11-1527(a)(1) (1973).

98. ANNUAL REPORT I, *supra* note 17, at 2.

99. D.C. Code § 11-1527(a)(2) (1973).

100. *Id.* § 11-1527(b).

101. *Id.* § 11-1527(a)(3). Under this section, four members must agree to remove or retire a judge. When the first Commission was created in 1970 there were only five members on the board. *Id.* § 11-1522. The Home Rule Act, however, provides for seven members. Pub. L. No. 93-198, § 431(d)(1), 87 Stat. 774 (1973). There is little indication whether Congress intended to reduce the consensus needed to remove or retire a judge or whether the failure to change the ratio was merely inadvertent.

The degree of concurrence required of the first Commission undoubtedly reflected an attitude that removal and involuntary retirement are severe sanctions which should not be invoked unless most of the Commissioners believed it was warranted. Therefore it seems reasonable to assume that Congress simply neglected to make the necessary numerical change. Many jurisdictions, however, require only a majority vote. *Compare* FLA. CONST. art. 5, § 17(A)(2)(c) (two-thirds vote) *and* DEL. CONST. art. IV, § 37 (two-thirds vote) *with* ALAS. STAT. § 22.30.050 (1976) (majority vote); California Commission on Judicial Performance, Rules for Censure, Removal, or Retirement of Judges, R. 917 (majority vote); LA. CONST. art. 5, § 25 (majority vote) *and* Supreme Court of Pennsylvania, Judicial Disability & Retirement Board Rules of Procedure, R. 14 (majority vote).

102. D.C. Code § 11-1529 (1973); *see* note 84 & accompanying text *supra*.

103. D.C. Code § 11-1527(c)(2) (1973).

104. *Id.* § 11-1527(c). The Commission's regulations state the Commission may request

As mentioned earlier,¹⁰⁵ the Home Rule Act devolved an additional obligation upon the Commission: its members must appraise the performance of any judge desiring reappointment.¹⁰⁶ In presenting the conference substitute for S. 1435, Congressman Charles C. Diggs, Jr. (D. Mich.) explained that since the Tenure Commission was regularly involved with accounts of judicial performance, responsibility for preparing the evaluation reports was delegated to its members.¹⁰⁷ Apparently Congress hoped the new reappointment technique would attract many candidates for judicial office by predicating continued tenure on merit rather than arbitrary political or philosophical considerations.

Following this legislative policy, the Commission has correctly perceived the limitations of its evaluative role:

The Commission's standards authorize no judgment on the judge's philosophy. The Commission firmly adheres to the view that it is immaterial to its evaluation whether the judge is "liberal" or "conservative," "lenient" or "severe," or whether Commission members agree or disagree with the merits of his decisions or the trend of his legal thinking.¹⁰⁸

The procedure for this evaluation, which is directed by the statute and regulations formulated by the Commission, is fairly simple but the ramifications are significant. To inaugurate an evaluation, the judge seeking review must remit a declaration of his candidacy to the Commission at least three months before his current term ends.¹⁰⁹ Otherwise a vacancy will occur and the selection of a new judge shifts to the Judicial Nomination Commission.¹¹⁰ Once this statement has been filed, the Commissioners must draft an evaluation of the candidate's performance during his present tenure and his eligibility for reappointment to an additional term. This report must be submitted to the President at least thirty days before the candidate's existing term expires.¹¹¹

In the written evaluation prepared for the President, the Commission must rate a candidate as exceptionally well qualified, well qualified,

an order from either the Superior Court of the District of Columbia or the United States District Court for the district in which the person may be found. 22 D.C. Reg. 2199, 2204-05 (Nov. 4, 1975).

105. See text accompanying note 79 *supra*.

106. Pub. L. No. 93-198, § 433(c), 87 Stat. 774 (1973).

107. 119 CONG. REC. 42038 (1973).

108. ANNUAL REPORT I, *supra* note 17, at 5.

109. Pub. L. No. 93-198, § 433(c), 87 Stat. 774 (1973). The regulations recommend that a candidate announce his candidacy at least six months prior to the end of his term. 22 D.C. Reg. 6441, 6441 (May 19, 1976).

110. Pub. L. No. 93-198, § 433(c), 87 Stat. 774 (1973); see note 74, *supra*.

111. Pub. L. No. 93-198, § 433(c), 87 Stat. 774 (1973).

qualified, or unqualified for appointment to another term. Once the Commissioners decide a candidate is either exceptionally well qualified or well qualified, the judge's tenure is automatically extended. If the judge receives a rating of qualified, the President may nominate and reappoint him, subject to Senate approval. If the President declines to nominate the individual, a vacancy results and again the Judicial Nomination Commission will be responsible for choosing nominees. Lastly, if the Commission deems a candidate unqualified, the President will not consider him for reappointment ". . . and such judge shall not be eligible for reappointment or appointment as a judge of a District of Columbia Court."¹¹²

The Commission did not promulgate any standards for these classifications until May 19, 1976, when it added another part to its published rules and regulations,¹¹³ establishing the following criteria:

A. *Exceptionally Well Qualified*—The judge's work product, legal scholarship, dedication, efficiency and demeanor are preeminent.

B. *Well Qualified*—The judge performs the judicial function with distinction and in a manner which consistently reflects credit on the judicial system.

C. *Qualified*—The judge satisfactorily performs the judicial function or is one whose strong positive attributes are materially offset, but not overborne, by negative traits.

D. *Unqualified*—The judge is unfit for further judicial service.¹¹⁴

These standards correspond to the language used in the Commission's earlier evaluation of Judge Halleck.¹¹⁵

The Commissioners invite the judge to forward a statement regarding his candidacy. Apparently the Commissioners depend quite heavily on interviews with people who are familiar with the candidate's judicial performance for material regarding the judge's fitness. Specifically, court personnel and attorneys who have appeared before the judge are questioned. The Commission also makes a general solicitation to the public for information and requests certain agencies which have continual contact with the court system to provide relevant information.¹¹⁶ The

112. *Id.*

113. 22 D.C. Reg. 6441, 6441-46 (May 19, 1976).

114. *Id.* at 6442.

115. See Report to the President of the United States on the Fitness for Reappointment of Judge Charles W. Halleck from the District of Columbia Commission on Judicial Disabilities & Tenure (Sept. 19, 1975), *partially reprinted in* 103 DAILY WASH. L. REP. 1652 (1975) [hereinafter cited as Report on Judge Halleck].

116. 22 D.C. Reg. 6441, 6443 (May 19, 1976).

Commissioners justify this reliance by citing the inherent difficulty of reviewing an individual's performance over a long period of time, the minimal staff and time allotted to the Commission, and the model presented by the American Bar Association's Standing Committee on the Federal Judiciary.¹¹⁷

The regulations present a method of securing information concerning a candidate from interested and knowledgeable persons. Judge Halleck raised certain objections to this practice, claiming the Commission had been unduly influenced by material from the office of the United States Attorney for the District of Columbia. Judge Thomsen dismissed this argument and approved the Commission's policy.¹¹⁸ He asserted the Commission had an obligation to collect and weigh information from people in the community, especially those who had appeared before the candidate, despite the possibility of bias.¹¹⁹ The Commission itself has recognized that a potential for partiality exists, but insists it "is quite capable of discounting for any bias."¹²⁰

The regulations also prescribe the nature and timing of the Commission's contacts with the judge. The candidate may be requested to undergo a medical examination at the Commission's expense and the judge is required to execute any necessary waivers and releases to enable the Commission to obtain relevant medical and tax information.¹²¹ Either the candidate or the Commission may request a private conference which counsel for both parties may attend.¹²²

117. ANNUAL REPORT I, *supra* note 17, at 5. The following notice is an example of the press releases issued by the Commission to the local media and national wire services:

NOTICE OF CANDIDATE FOR JUDICIAL REAPPOINTMENT

This is to notify members of the bar and the general public that Judge Charles W. Halleck, Judge of the Superior Court of the District of Columbia, is a candidate for reappointment to the Superior Court upon the expiration of his term on October 20, 1975

[The notice recites the pertinent statutory provision and continues:] Written or oral communications should be mailed or delivered by August 22, 1975 to members of the Commission at its offices at 717 Madison Place, N.W., Room 212, Washington, D.C. 20005, (telephone 628-1255) or to the attention of Ms. Cathaee Hudgins, Administrative Assistant to the Commission.

Commission on Judicial Disabilities & Tenure, *Notice of Candidate for Judicial Reappointment*, 103 DAILY WASH. L. REP. 1325, 1325 (Aug. 4, 1975).

118. 427 F. Supp. at 1234-35.

119. *Id.*

120. ANNUAL REPORT I, *supra* note 17, at 6.

121. 22 D.C. Reg. 6441, 6443-44 (May 19, 1976). Each sitting judge is required to file an annual financial statement with the Commission which includes a report on income, liabilities, and interests in property. The Commission, however, relies solely on the judge to furnish this statement. Failure to submit a report "or filing of a fraudulent report, shall constitute willful misconduct in office and shall be grounds for removal from office under section 11-1526(a)(2)." D.C. Code § 11-1530(b)(3) (1973).

122. 22 D.C. Reg. 6441, 6444-45 (May 19, 1976).

If the judge's automatic reappointment is in jeopardy, the Commissioners will divulge the basis for their concern and permit the candidate to respond to the questions raised. However, an adversary hearing is not required.¹²³ Lastly, the statute does not denote any opportunity to appeal the Commission's determination.

Because the Commissioners intend to print an annual report disclosing their current activities, it should be fairly easy to monitor the Commission's effectiveness. On December 31, 1976, the Commission published its first annual report, covering the period from April, 1975, to September, 1976.¹²⁴

The profile of disciplinary matters shows that the full Commission considered fifty-eight incidents involving judges of the superior court. Most of the complaints were registered by individual litigants. Thirty-eight charges were dropped almost immediately. Although the announcement did not indicate why these cases were eliminated, it is probable that many of the cases reported were outside the Commission's jurisdiction.¹²⁵ Following a preliminary examination, sixteen others were

123. *Id.* at 6445. The Commission's evaluation of Judge Halleck, which occurred in late summer of 1975, was completed without the benefit of published guidelines. Judge Halleck attacked this *modus operandi*; he alleged that in the absence of express procedures and standards, the Commission's actions were arbitrary and violated due process.

Judge Thomsen did not view the Commission's failure to establish procedures constitutionally infirm. Judge Thomsen remarked that the statute did not require the Commission to afford the judge a formal hearing. He noted the substantial similarity between the procedures which were eventually promulgated and those followed by the Commission in 1975. Judge Thomsen continued: "So long as the Commission affords a judge seeking reappointment that process which is due, as the court concludes plaintiff was afforded, the procedures need not be published in advance." 427 F. Supp. at 1237 n.15. Judge Thomsen also rejected Halleck's allegation that the lack of established standards invalidated the "qualified" rating Judge Halleck received from the Commission. *Id.* at 1238.

Judge Thomsen's analysis is appealing. A retrospective determination that the procedures used were valid, however, does not entirely eliminate the disadvantages which Judge Halleck incurred. He could not know which aspects of his tenure the Commission might emphasize and tailor his presentation accordingly. Nor could Judge Halleck anticipate how the Commission would organize its evaluation or make timely and appropriate objections to the Commission's procedures. Although the absence of procedures and standards probably did not significantly prejudice Judge Halleck's evaluation, published guidelines are infinitely superior to informal ones. Apparently the Commissioners agree as they subsequently promulgated procedures and standards. *See* text accompanying notes 113-15 *supra*.

124. ANNUAL REPORT I, *supra* note 17. Although the D.C. Home Rule Charter was approved in a referendum held on May 7, 1974, and the Act became effective on February 1, 1975, appointments to the Commission were delayed and the Commission did not begin operating until April of 1975. *Id.* at 1.

125. *Id.* at 1-2. Ms. Hudgins remarked that most of the allegations received by the Commission are from litigants or their relatives who do not truly understand the Commission's authority or purpose. They object to individual verdicts or sentences which are

abandoned.¹²⁶ The four remaining cases necessitated some official response. Two inquests were concluded with private, informal letters to the judges involved, while a Notice of Formal Proceeding was issued to each of the other judges.¹²⁷ In fiscal year 1977, thirty-two complaints were lodged with the Commission. Three disciplinary investigations were still pending on September 30, 1977. During this period the Commission also conducted its first health inquiry.¹²⁸

The disciplinary review of Judge Halleck's behavior was completed during this period. Prior to the formal hearing conducted by the Commission, Judge Thomsen determined that ordinarily the Commission has the discretion to apprise the public of its determination not to remove a judge even though sufficient grounds exist.¹²⁹ Nevertheless, Judge Thomsen ruled:

[B]ecause of the publicity already given to both the instant case and the Commission's proceedings in regard to plaintiff, the

beyond the Commission's prerogative. Interview with Cathae Hugins in Washington, D.C. (Aug. 26, 1977).

In a similar vein the Commission itself has commented:

In carrying out its disciplinary role, the Commission seeks carefully to distinguish between a judge's conduct that might warrant its scrutiny and judicial action which, if questionable at all, is merely erroneous and should be subject only to appellate review. The Commission has observed that disappointed litigants sometimes communicate complaints to the Commission that do not reflect an understanding of this important distinction. The distinction, on occasion, is difficult to draw, and there are circumstances wherein the distinction is only one of degree. For example, unwarranted exercise of the contempt power is correctable on appeal, but a point can be reached where its persistent exercise or threat could amount to conduct meriting the Commission's attention.

ANNUAL REPORT I, *supra* note 17, at 2.

126. ANNUAL REPORT I, *supra* note 17, at 2.

127. *Id.* On May 17, 1976, the Commission directed a reprimand to Associate Judge Edward A. Beard of the Superior Court, now retired, criticizing his participation in the release of a defendant who was the subject of a civil *ne exeat* proceeding. The Commission denounced the course followed to perfect the release and admonished Judge Beard for failing to refer the case to a designated emergency judge.

However, the Commission also acknowledged that Judge Beard did not benefit from the transaction and did not question his personal integrity. The Commissioners balanced these findings and concluded: "[T]he Commission believes that your conduct was ill-advised and that its irregularities could have given rise to the appearance of impropriety; it is therefore disapproved." Letter from Commission on Judicial Disabilities & Tenure to Judge Edward A. Beard at 3 (May 17, 1976). The reprimand was made public and excerpts appeared in a local newspaper. Wash. Post, May 21, 1976 § C, at 1, col. 5.

The second formal proceeding, which involved Judge Halleck, was still pending when the first annual report was prepared. ANNUAL REPORT I, *supra* note 17, at 2. Judge Halleck's case is discussed at text accompanying notes 129-32 & 173-89 *infra*.

128. ANNUAL REPORT OF THE DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE (October 1976-September 1977), at 1 (hereinafter cited as ANNUAL REPORT II).

129. 427 F. Supp. at 1247.

wisest course is to require that if the Commission should determine that grounds for removal of plaintiff exist, but that under all the circumstances plaintiff should not be removed from office, no public statement to that effect shall be made (regardless of whether the Commission also concludes that its decision and the reasons therefor should be made public), unless (a) plaintiff authorizes that a public statement be made, or (b) the judgment which will be entered in this case is affirmed on appeal, or (c) the time for taking such an appeal has elapsed.¹³⁰

Judge Halleck has not consented to a release of his records. He did, however, file two appeals which were subsequently dismissed: one by the court as moot and the other at Judge Halleck's request.

Despite these events, the Commission recently refused to disclose the results of its disciplinary proceeding against Halleck.¹³¹ Perhaps the Commissioners believe none of the conditions precedent to releasing this information have been met. More likely, however, the Commissioners are being extremely circumspect and have decided not to produce their evaluation due to the special circumstances described by Judge Thomsen. Alternatively, one might assume either that Judge Halleck was exonerated of any impropriety or that his misconduct warranted only a private reprimand. A newspaper article, however, suggested that Halleck was rebuked by the Commission.¹³²

The Commission has also had several opportunities to exercise its reappointment powers. Between April, 1975, and September, 1976, four judges whose original terms were scheduled to end announced their candidacy for reappointment. Since one applicant later withdrew his candidacy,¹³³ the Commission actually finished only three evaluations during this period. The Commission determined that two of the judges were exceptionally well qualified¹³⁴ and one was qualified.¹³⁵

130. *Id.*

131. Telephone conversation with Cathaee Hudgins (Sept. 15, 1977).

132. *See* note 185 *infra*.

133. Judge Alexander announced his retirement on September 10, 1976, effective November 8, 1976. 104 DAILY WASH. L. REP. 1925 (1976); *see* note 1 *supra*.

134. *See*, Report to the President of the United States on the Fitness for Reappointment of Chief Judge Harold Greene from the District of Columbia Commission on Judicial Disabilities & Tenure (Oct. 1, 1976); Report to the President of the United States on the Fitness for Reappointment of Judge Tim Murphy from the District of Columbia Commission on Judicial Disabilities & Tenure (Oct. 1, 1976), *reprinted in* 104 Daily Wash. L. Rep. 1753, 1756 (1976).

Under the statute, this rating guarantees automatic reappointment. *See* text accompanying note 112 *supra*.

135. The report on Judge Halleck was forwarded to the President on September 19,

From October 1, 1976, through September 30, 1977, the Commissioners considered an additional four reappointments. All three superior court candidates were deemed well qualified,¹³⁶ while the court of appeals candidate was classified exceptionally well qualified.¹³⁷ More recently, the Commission evaluated the performance of three other superior court judges. All of these candidates will be automatically reappointed.¹³⁸

IV. THE COMMISSION'S PROSPECTS

It would be premature to judge the Commission's impact on the basis of available data. Assessed in the abstract, the D.C. Commission compares favorably to other tenure systems as it possesses many qualities which promote independent and effective boards:¹³⁹ the Commission is an independent agency with a diverse membership of lawyers, laypersons, and a federal district court judge which should shield tenure decisions from extraneous influences.

1975. See note 115 *supra*. This rating shifts the responsibility for reappointment to the President and the Senate. See text accompanying note 112 *supra*. The circumstances surrounding Judge Halleck's prolonged candidacy are set forth at text accompanying notes 167-89 *infra*.

136. See Report to the President of the United States on the Fitness for Reappointment of Judge Fred L. McIntyre from the District of Columbia Commission on Judicial Disabilities & Tenure (Feb. 18, 1977), *reprinted in* 105 DAILY WASH. L. REP. 353 (1977); Report to the President of the United States on the Fitness for Reappointment of Judge Alfred Burka from the District of Columbia Commission on Judicial Disabilities & Tenure (May 27, 1977) *reprinted in* 105 DAILY WASH. L. REP. 977 (1977) [hereinafter cited as Report on Judge Burka]; Report to the President of the United States on the Fitness for Reappointment of Judge John D. Fauntleroy from the District of Columbia Commission on Judicial Disabilities & Tenure (May 27, 1977), *reprinted in* 105 DAILY WASH. L. REP. 985 (1977). This classification assures reappointment. See text accompanying note 112 *supra*.

137. See Report to the President of the United States on the Fitness for Reappointment of Judge Catherine G. Kelly from the District of Columbia Commission on Judicial Disabilities & Tenure (May 27, 1977), *reprinted in* 105 DAILY WASH. L. REP. 965 (1977).

138. Judge Belson received a unanimous exceptionally well qualified rating. Report to the President of the United States on the Fitness for Reappointment of Judge James A. Belson from the District of Columbia Commission on Judicial Disabilities & Tenure (Jan. 27, 1978) *reprinted in* 106 DAILY WASH. L. REP. 205 (1978). The votes for Judge Pryor and Judge Green, however, were split. Two Commissioners graded Judge Pryor as exceptionally well qualified while four regarded him well qualified. Report to the President of the United States on the Fitness for Reappointment of Judge William C. Pryor from the District of Columbia Commission on Judicial Disabilities & Tenure (Jan. 27, 1978) *reprinted in* 106 DAILY WASH. L. REP. 213 (1978). Judge Green received three well qualified and three exceptionally well qualified votes. Report to the President of the United States on the Fitness for Reappointment of Judge Joyce Hens Green from the District of Columbia Commission on Judicial Disabilities & Tenure (Jan. 27, 1978), *reprinted in* 106 DAILY WASH. L. REP. 197 (1978).

139. See text accompanying notes 20-48 *supra*.

The District's Commission does have a small staff: one executive assistant to handle daily operations, a Special Counsel retained on a continuous basis to represent the Commission,¹⁴⁰ and an investigator employed on an ad hoc basis.¹⁴¹ Although more administrative support is probably needed, the executive assistant's presence facilitates the receipt and distribution of complaints and information, an extremely important function. In the future, the projected annual report should furnish sufficient data to measure the Commission's performance.

The Commission's structure and the regulations formulated by its members should promote a prompt and thorough review of both disciplinary matters and reappointments while affording judges many procedural protections. To date, the Commission seems to have provided a more efficient and effective disciplinary device than the mere threat of impeachment.¹⁴² Not only has it condemned the behavior of several judges since 1971, but its reappointment provisions preclude prolonged vacancies, since the evaluations must be completed thirty days before a candidate's term expires. In addition to its broad disciplinary and retirement powers, the District of Columbia Tenure Commission has the unique authority of reappointment.

These features will enable the Commission to select sanctions appropriate to individual circumstances and condition judicial tenure on merit rather than political or ideological predilections. Moreover, the composition of the Commission and its extensive authority comport with the spirit of home rule.

Notwithstanding these positive attributes, there are deficiencies which might eventually affect the Commission's credibility as well as its ability to function competently.¹⁴³ First, the Commission needs to become more

140. ANNUAL REPORT I, *supra* note 17, at 7.

141. ANNUAL REPORT II, *supra* note 128, at 9.

142. See notes 56-61 & accompanying text *supra*. Available records indicate that no member of the local court system was ever impeached.

143. One criticism which is tangential to the Commission's operation and authority concerns the roles performed by the President and Senate in reappointment proceedings. Although the Presidential and Senate participation is extremely limited, it seems absurd to continue even this degree of federal supervision over a local judiciary. Instead, this responsibility (along with initial appointments, *see* note 74 *supra*) should be vested in the mayor and City Council who are probably more familiar with an individual's judicial performance and have an immediate interest in preserving the integrity of the court system.

While the United States Government has a special interest in protecting the status of the Federal City, the alarm expressed during Congressional debate over which executive and which legislature should have the final appointment power was exaggerated. *See generally* 119 CONG. REC. 33365-68, 42041-42 (1973) (remarks of Congressmen Nelson and Broyhill). Congressional concern was excessive, given the many other safeguards included in the

widely known. Since the Commission depends on information from individuals and organizations in the community, people must be aware of the Commission's existence and responsibilities.

The Commissioners realize they cannot operate properly without input from attorneys and others:

[U]nless the community, and especially lawyers having regular contact with the courts, take initiative in bringing to the Commission's attention information pertaining both to its disciplinary and to its evaluation functions, it will be difficult if not impossible fully to accomplish the objectives of Congress in creating an important instrument of home rule.¹⁴⁴

Yet the Commission's efforts to stimulate interest have apparently been misguided as the response from all sectors, especially from the general public, has been limited and disappointing.¹⁴⁵

Of course, it is often difficult to prompt public participation. Nonetheless, the Commission must encourage and obtain actionable complaints and pertinent evaluative information from a variety of sources. Otherwise, the Commission might receive a less than accurate image of the judge or remain unaware of objectionable conduct. In this respect, the Commission should study the possibility of making public service announcements on television and radio and generally expanding media coverage of its activities.

Another problem concerns the exact scope of the Commission's authority. The Commissioners claim, and Judge Thomsen agreed, that the statutory power to remove incorporates the capacity to reprimand.¹⁴⁶ Yet the issue remains, under what conditions may the Commission levy a penalty short of removal?

In addressing the question, Judge Thomsen first concluded that the Commission is limited to reviewing conduct which is proscribed by the statute.¹⁴⁷ But the judge also assumed that the Commission must determine that a *prima facie* case for removal exists before instituting any action: "[T]he Commission should not institute any disciplinary investigation or proceeding unless the Commission believes that the alleged conduct, if proved, *may* warrant removal from office on the grounds set out in the statute."¹⁴⁸

Home Rule Act, *see* note 75 *supra*, and the ultimate authority over the District which Congress possesses.

144. ANNUAL REPORT I, *supra* note 17, at 7.

145. *Id.* at 5-7.

146. *See* text accompanying notes 89-90 *supra*.

147. 427 F. Supp. at 1245.

148. *Id.* at 1245 n.38 (emphasis added).

Essentially, Judge Thomsen believes the Commissioners may impose a reprimand only after they have decided that although grounds for removal exist, mitigating circumstances justify a lesser sanction. Although one might properly infer that the Commission has the lesser power to censure, it does not inevitably follow, as Judge Thomsen insists, that the alleged misbehavior must meet a removal threshold before the Commission may act. Neither the statutory language, nor the Commission's regulations compel this result.¹⁴⁹

The Act simply authorizes the Commission to remove, retire, or suspend a judge for a variety of reasons.¹⁵⁰ The statutory procedures for investigating judicial behavior do not require that an initial threshold be met.¹⁵¹ Furthermore, the regulations governing Commission disciplinary proceedings allow a preliminary investigation to determine whether formal action should be pursued.¹⁵²

149. Judge Thomsen attempted to distinguish two state supreme court cases, *In re Dupont*, 322 So. 2d 180 (La. 1975) and *In re Diener*, 268 Md. 659, 304 A.2d 587 (1973), *cert. denied*, 415 U.S. 989 (1974), because the applicable provisions were different from the D.C. Act. *Id.* at 1246 n.39.

In *Dupont*, the Louisiana Supreme Court was applying a state constitutional provision which specifically granted the tenure commission power over removal and involuntary retirement. The court determined: "[I]n our view, the Judiciary Commission's right under the 1921 La. Const. (Art. IX, Sec. 4 subd. D) to recommend 'the removal or involuntary retirement of a justice or judge' includes the lesser power to recommend censure." 322 So. 2d at 183.

Under Maryland's Constitution, the court of appeals may remove, retire, or censure a judge while the Commission on Judicial Disabilities is empowered to submit recommendations for removal and disability retirement only to the court of appeals. MD. CONST. art. IV, § 4B. Pursuant to its authority to promulgate procedures for the Commission, the court of appeals adopted a rule which included the authority to recommend censure in addition to removal and retirement. MD. R. 1227 n.

In upholding the constitutionality of the rule the Maryland Supreme Court explained: [W]e cannot escape concluding that the grant of the greater power impliedly includes the lesser. If we have the power to retire, remove or censure, certainly the Commission can recommend identical sanctions. To hold otherwise would mean that so limiting the Commission's authority to a recommendation of retirement or removal only would create a void into which minor infractions would fall, unnoticed and uncorrected. 268 Md. at 683, 304 A.2d at 600.

150. D.C. Code § 11-1521 (1973).

151. *Id.* at § 11-1527.

152. 22 D.C. Reg. 2199, 2210-12 (Nov. 4, 1975). The portion of the regulations entitled "Procedures for Investigations and Formal Proceedings" states:

Preliminary Investigation

(a) The Commission, upon receiving information by way of formal or informal complaint or report or otherwise (that a judge has engaged in questionable conduct) . . . may make a preliminary investigation to determine whether a formal proceeding should be instituted.

(b) If the Commission concludes that the information, complaint, or report is

Judge Thomsen's approach is overly restrictive and would preclude the Commission from attacking injudicious conduct which does not, on its face, warrant removal. If his analysis is correct, Congress may wish to reconsider the problem. Surely the Commission should be empowered to regulate all degrees of misbehavior.¹⁵³ Otherwise, the Commission will be unable to check behavior which, though insufficient for removal, still reflects badly on the judiciary. In addition, the Commission's ability to pursue an informal resolution might be hampered if the judge believes his actions do not fall within the Commission's jurisdiction.

Another potential source of continued controversy involves the standards for reviewing a judge's conduct. In his action against the Commission, Judge Halleck argued that the criteria for examining a judge's behavior are unconstitutionally vague and overbroad.¹⁵⁴ Judge Thomsen, however, rejected this objection.¹⁵⁵ He noted that challenges to the constitutionality of the American Bar Association Code of Judicial Conduct have not succeeded because "the Code . . . furnished sufficient specification of the judicial conduct which warrants disciplinary action."¹⁵⁶ Judge Thomsen pointed out that the Commission's Notice of Formal Proceeding specifically referred to those portions of the Code which Judge Halleck might have violated. Judge Thomsen concluded that since the Code provisions supplement the standards listed in the Act, the statutory standards do not violate the due process clause.¹⁵⁷

In spite of Judge Thomsen's opinion, these guidelines are quite subjective and open to abuse, especially when coupled with the Commission's policy of considering mitigating factors. To appreciate this problem, one

unfounded, frivolous, without sufficient merit for further consideration, or is beyond its jurisdiction, it may close the matter without further action and may notify the complainant, if there be one, and the judge, of such conclusion. If on the other hand it appears to have substance and falls within the Commission's jurisdiction the Commission's investigation will go forward to determine whether a formal proceeding should be instituted. . . .

153. *Id.* See text accompanying notes 37-40 *supra*.

154. 427 F. Supp. at 1239.

155. *Id.* at 1240.

156. *Id.*

157. *Id.* Judge Halleck also complained that the combination of investigative, prosecutorial, and adjudicative functions into one agency violated due process guarantees. In rejecting this claim, Judge Thomsen relied on *Withrow v. Larkin*, 421 U.S. 35 (1975), as well as a number of lower court decisions. *Id.* at 1243-44.

Commentators, however, criticize the consolidation of all these duties in one administrative agency. Cf. B. SHIMBERG, B. ESSER, & D. KRUGER, *OCCUPATIONAL LICENSING: PRACTICES AND POLICIES* 11-15, 216, 227-28 (1973) (discussing the delegation of investigative, prosecutorial, and adjudicative functions to one licensing agency). To avoid future challenges it will be necessary to separate completely the investigative and prosecutorial responsibilities from the adjudicative ones.

might compare Judge Halleck's candidacy for reappointment with that of another superior court judge. While Judge Halleck received only a qualified rating, primarily on account of his courtroom misdemeanor,¹⁵⁸ a subsequent candidate was rated well qualified even though the Commissioners admitted he frequently displayed judicial intemperance.¹⁵⁹ Apparently the second judge's dedication and personal problems sufficiently outweighed his injudicious behavior.¹⁶⁰ Yet Judge Halleck's "strong positive attributes" could only prevent an unqualified rating.¹⁶¹

Doubtless, all the facts of these two cases are not available and perhaps the Commission's determinations were fair. Nevertheless, this comparison suggests the degree to which subjective elements might enter the Commission's decision. It is improbable that this uncertainty can be eliminated.

The Commission could probably develop more definite and objective criteria. The simplest solution would be to articulate what behavior is forbidden. This practice, however, could not exhaust all possible instances of unacceptable conduct. Furthermore, if the Commission is restricted, the flexibility of the current system will be sacrificed. Accordingly, the candidates and the public should accept the authority vested in the Commission and trust that the members will exercise their discretion wisely.

Another obstacle to the Commission's success relates to the Commission's efforts to preserve the confidentiality of its disciplinary proceedings. Both the Court Reform Act and the Commission's regulations refer to confidentiality.¹⁶² The Commission avers it is only obligated to ensure

158. Report on Judge Halleck, *supra* note 115, at 4-5.

159. Report on Judge Burka, *supra* note 136, at 7-8.

160. *Id.* at 9-10.

161. Report on Judge Halleck, *supra* note 115, at 6. Compare Report on Judge Burka, *supra* note 136, with Report on Judge Halleck, *supra* note 115.

162. The section in the Court Reform Act respecting privilege and confidentiality reads:

The filing of papers with and the giving of testimony before the Commission shall be privileged. Unless otherwise authorized by the judge whose conduct or health is the subject of the proceedings under this subchapter, the hearings before the Commission, the record thereof, and all papers filed in connection with such hearings shall be confidential. But on prosecution of a witness for perjury or on review of a decision of the Commission, the record of hearings before the Commission and all papers filed in connection therewith shall be disclosed to the extent required for the prosecution or review.

D.C. Code § 11-1528(a) (1973). The Commission's disciplinary and retirement regulations basically iterate this statutory language, 22 D.C. Reg. 2199, 2209-10 (Nov. 4, 1975), but another section of the regulations stipulates: "Every witness in every investigation or other proceeding under these rules shall swear or affirm to tell the truth and not to disclose the existence of the proceeding or the identity of the judge involved unless or until the

the secrecy of the hearing process; nevertheless, it "makes every reasonable effort to maintain confidentiality throughout all the preliminary steps."¹⁶³

Judge Thomsen concurred in the Commission's view. He argued that the Commission's regulations advert to witnesses only. Judge Thomsen also stated it would not be feasible to pledge every participant to secrecy:

[The] language [of the rule] does not expressly require that each person to whom the special counsel speaks while looking into a complaint about a judge received by the Commission must be formally sworn to confidentiality; the rule is framed in terms of "witnesses". It would not be practicable for the special counsel to require everyone with whom he has contact to make a formal oath or affirmation.¹⁶⁴

Yet Judge Thomsen's reading of the rule might be too literal, for the regulations also refer to "every investigation or other proceeding."¹⁶⁵ Moreover, a limited rule of confidentiality is clearly inadequate. If privacy cannot be sustained, the Commission might unwittingly subject the judge to unjustified embarrassment, sacrifice the judge's cooperation, and cripple its own capacity to mediate informal settlements.¹⁶⁶ The infirmities inherent in the Commission's position were particularly conspicuous during its investigation of Judge Halleck in 1976.

V. JUDGE HALLECK'S REAPPOINTMENT CANDIDACY

The leaks to the media which occurred throughout the Halleck investigation adversely affected the judge's nomination for reappointment. One might even conclude that the separate responsibilities of the legislature and the Commission were ignored and the Senate, in effect, abrogated the Commission's disciplinary role. Before examining this anomaly, a brief history of Judge Halleck's candidacy is necessary.

Judge Halleck announced his candidacy more than three months before his first term was due to expire.¹⁶⁷ After an intensive and controversial inquiry,¹⁶⁸ the Commission conferred a rating of qualified and for-

proceeding is no longer confidential under these rules." *Id.* at 2204. The Commission's regulations governing its reappointment duties also contain a provision for privilege and confidentiality which protects both the judge and individuals who supply information to the Commission. 22 D.C. Reg. 6441, 6445-46 (May 19, 1976).

163. ANNUAL REPORT I, *supra* note 17, at 3.

164. 427 F. Supp. at 1243.

165. 22 D.C. Reg. 2199, 2204 (Nov. 4, 1976); see note 162 *supra*.

166. See text accompanying notes 43-46 *supra*.

167. Judge Halleck was originally appointed on October 20, 1965, for a 10 year term. He declared his candidacy for a second term on July 10, 1975, 3 months and 10 days prior to the end of his tenure.

168. Apparently the Commission received a large volume of disparaging commentary

warded the evaluation to President Ford on September 19, 1975.¹⁶⁹ The President submitted Halleck's name to the Senate on October 20, 1975.¹⁷⁰ Following a hearing and extended deliberation, the Senate Committee on the District of Columbia voted unanimously for Halleck's renomination on August 10, 1976, and finally reported to the full Senate seventeen days later.¹⁷¹

In explaining the long delay over Judge Halleck's nomination, Senator Thomas Eagleton, the committee chairman who had supported Halleck's candidacy, commented: "I wanted to determine over a period of time what Halleck's future might be. I wanted to stand back and take a

from the United States Attorney's office and reviewed approximately 42 cases decided by Judge Halleck. Additionally, there was considerable criticism over the lack of procedures, and concomitant fears that Judge Halleck was not receiving a fair review of his qualifications. See Wash. Post, Sept. 12, 1975, § A, at 1, col. 6; Wash. Post, Sept. 16, 1975, § A, at 1, col. 4; Wash. Post, Sept. 17, 1975, § C, at 1, col. 5; Wash. Post, Sept. 19, 1975, § C, at 1, col. 5; Wash. Post, Sept. 20, 1975, § A, at 1 col. 5.

169. Report on Judge Halleck, *supra* note 115. The report summarized Judge Halleck's affirmative and negative qualities and continued:

In considering the qualifications and fitness of a sitting judge special attention must be paid to the manner in which the judge conducts his day to day business in court. In large metropolitan courts such as the Superior Court, judges confront overloaded dockets, inadequate facilities, insufficient supporting help and must frequently deal with inexperienced or ill-prepared lawyers and other frustrating conditions. If a judge permits these conditions to undermine his necessary restraint and immateriality, he serves the administration of justice badly and if he cannot place his exasperations under control he should not remain in office. Litigants, witnesses, lawyers, court personnel and others present in court soon lose respect for justice when a judge interjects his personal views unduly into litigation or resorts to sarcasm, banter, rudeness and other unjudicial conduct. An atmosphere of prejudice and favoritism is created which undermines the integrity of the system.

In spite of the substantial negative aspects of Judge Halleck's judicial performance, his strong positive attributes lead us to determine that he is qualified for reappointment.

Id. at 5-6.

170. Wash. Post, Oct. 21, 1975, § A, at 1, col. 1

171. EXEC. RPT. NO. 32, 94th Cong., 2d Sess. (1976). Notwithstanding the unanimous vote, three committee members reserved the right to address the Senate during debate and to oppose the appointment. The Committee's evaluation read in part:

Faced with [a] . . . widely differing assessment by members of the public and the bar, the Committee gave great weight in arriving at its decision on this nomination to the conclusion reached by the Tenure Commission for two reasons.

First, from a legal and institutional standpoint, the Tenure Commission is the agency of the District of Columbia with primary responsibility for evaluating judicial performance. This committee's commitment to the principle of home rule for the District of Columbia requires that whenever possible deference be given to local governmental decisions on local matters. In this connection, it should be emphasized that decisions respecting the State courts are, generally speaking, local ones, for the Superior Court is the 'state' court for the District of Columbia

dispassionate look. In the intervening months . . . Halleck wasn't totally immaculate, but I'm convinced Judge Halleck knows it was a close call and that's going to benefit him."¹⁷²

Meanwhile, since March, 1976, the Commission had been studying several incidents involving Judge Halleck and on June 14, 1976, the Commission issued a Notice of Formal Proceeding.¹⁷³ The notice indicated that if the information received by the Commission were sustained, Judge Halleck would have violated Canons 2A¹⁷⁴ and 3A(3)¹⁷⁵ of the Judicial Code of Conduct, which would warrant further Commission action. Reporters for the *Washington Post* were apprised of the Commission's activities and the newspaper began publishing detailed accounts of these events.¹⁷⁶

Subsequently, Senator McClellan, a member of the Senate Committee on the District of Columbia which had initially reviewed Halleck's nomination, contacted the Commission to inquire whether the Commission was prosecuting Halleck and when the disciplinary proceeding would be finished.¹⁷⁷ Citing the confidentiality restrictions, the Commission's

The second reason for relying heavily on the conclusion of the Tenure Commission in this instance is more pragmatic. The Tenure Commission is representative of the community and is in a better position to determine community needs and to assess the ability of judicial candidates to meet those needs than is the Senate. Moreover, several members of the Tenure Commission, by virtue of their extensive experience as judges and attorneys in the District of Columbia, are particularly well suited to balance the positive and negative qualities of Judge Halleck and arrive at a sound decision

Finally, in reaching its decision on this nomination, the Committee is mindful that the Tenure Commission's disciplinary powers under § 432 of the Act can—and should—be brought to bear if Judge Halleck's future conduct should prompt an adverse finding as to his qualifications at any time during his term of office.

Id. at 5-6.

172. Wash. Post, Aug. 11, 1976, § A, at 6, col. 1.

173. Inquiry concerning a Judge, No. 2-76 (Commission on Judicial Disabilities & Tenure, June 14, 1976) (attached to Plaintiff's Complaint as Exhibit B in *Halleck v. Berliner*, 427 F. Supp. 1245 (D.D.C. 1977)).

174. "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." ABA JUDICIAL CODE OF CONDUCT, Canon 2A.

175. "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control." *Id.* at Canon 3A(3).

176. As early as May, over a month before the Notice of Formal Proceeding was mailed, the *Washington Post* reported that Halleck was under investigation by the Commission. Wash. Post, May 7, 1976, § A, at 1, col. 3.

177. Letter from Senator John McClellan to Chairman Henry A. Berliner (Aug. 27, 1976) (attached to Defendant's Answer as Exhibit 3 in *Halleck v. Berliner*, 427 F. Supp. 1245 (D.D.C. 1977)).

chairman declined to confirm the existence of any pending action against Judge Halleck.¹⁷⁸ Chairman Berliner explained to Senator McClellan that confidentiality was designed to protect a judge from unproven allegations.

Senator McClellan next asked Judge Halleck to relinquish his confidentiality privilege so the Senate could examine the rumored Commission charges before voting on his nomination.¹⁷⁹ Senator McClellan reportedly secured promises from the other Committee members not to bring Halleck's nomination up for discussion before the Senate unless the judge consented to a release of the Commission records.¹⁸⁰

The confrontation with Senator McClellan placed Judge Halleck in an untenable position. He could either accede to the Senator's request and risk having the Senate consider charges which the Commission had not yet fully explored or refuse to waive his privilege and forfeit the nomination.¹⁸¹

Judge Halleck refused. He claimed he could not legally waive his right to confidentiality and argued if he yielded, the value of the privilege for other judges would be diminished.¹⁸² His nomination was never reviewed by the full Senate before the body adjourned from October 2, 1976, until January 1977. Under the Senate's Standing Rules, Halleck's nomination had to be returned to the President and resubmitted before the Senate could consider it.¹⁸³ President Ford did not resubmit Halleck's nomina-

178. Letter from Chairman Henry A. Berliner to Senator John McClellan (Aug. 31, 1976) (attached to Defendant's Answer as Exhibit 4 in *Halleck v. Berliner*, 427 F. Supp. 1245 (D.D.C. 1977)).

179. Letter from Senator John McClellan to Judge Halleck (Sept. 10, 1976) (existence of the letter reported in *Wash. Post*, Sept. 24, 1976, § D, at 2, col. 5, and in Plaintiff's Complaint in *Halleck v. Berliner*, 427 F. Supp. 1245 (D.D.C. 1977)).

180. *Wash. Post*, Sept. 24, 1976, § D, at 2, col. 5.

181. Judge Halleck made this same argument to Judge Thomsen, but he contended that the Commission itself had disclosed the existence of the formal proceeding, thereby influencing his candidacy. Plaintiff's Memorandum of Law at 47-49, *Halleck v. Berliner* 427 F. Supp. 1245 (D.D.C. 1977). Judge Thomsen ruled that no Commission members or employees had disclosed the existence of the secret proceedings. 427 F. Supp. at 1243.

182. *Wash. Post*, Sept. 24, 1976, § D, at 2, col. 5.

183. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

Senate Committee on Rules & Administration, Standing Rules of the U.S. Senate & Provisions of the Legislative Reorganization Acts of 1946 & 1970 relating to Operation of the Senate (Mar. 7, 1975).

tion before leaving office on January 21, 1977.¹⁸⁴ Four months later, President Carter announced he would not tender Halleck's name to the Senate.¹⁸⁵ Therefore, when Halleck rejected McClellan's ultimatum, the Senator was able to block the judge's reappointment.¹⁸⁶

The deliberate obstruction of Judge Halleck's nomination on the basis of a pending disciplinary action, which is within the purview of the Commission, not the Senate, is highly objectionable. In originally approving Judge Halleck's nomination, the Senate Committee on the District of Columbia acknowledged the distinct functions exercised by the Commission and the Senate. The Committee noted that the judge had engaged in questionable practices. But, rather than reject Halleck's nomination, the Committee members deferred to the Commission's evaluation and simply urged that he be disciplined if his misconduct continued.¹⁸⁷

Since the confidentiality privilege enjoyed by both judges and witnesses in disciplinary and reappointment proceedings is practically absolute, Congress does not have ready access to the Commission's files for its deliberation.¹⁸⁸ Yet, if the Senate can predicate floor debate and vote on the revelation of confidential records, its members will be able to evade the protections which Congress itself accorded the District's judges.

Certainly the Senate should make informed decisions when contemplating Presidential appointments. But the Commission's disciplinary functions and the Senate's advice and consent duties should not be

184. Wash. Post, Jan. 27, 1977, § B, at 7, col. 3.

185. Wash. Post, May 21, 1977, § A, at 1, col. 3. The *Post* article insinuated that Carter had refused the nomination based on additional communication with the Commission: "It is understood that the White House has been recently informed by the local judicial tenure commission that the panel had secretly criticized Halleck's conduct on the bench in the last year." *Id.*

186. Wash. Post, Sept. 24, 1976, § D, at 2, col. 5; Wash. Post, Oct. 27, 1976, § A, at 1, col. 1.

187. See note 171 *supra*.

188. Neither the identity of the witness or judge nor any material connected with a disciplinary action will be disclosed unless needed for a subsequent appeal from a Commission Order, or for the prosecution of a witness for perjury. D.C. Code § 11-1528 (1973); 22 D.C. Reg. 2199, 2209-10 (Nov. 4, 1975); see note 162 *supra*. The prohibition which applies to reappointment evaluations does not extend to the President:

The identity of any person furnishing information to the Commission will not be disclosed to anyone, including the judge, unless such person agrees to such disclosure, nor will the substance of any such information be revealed to anyone other than the judge or counsel for the judge, except as may be set forth in the Commission report to the President. However, should the President request that the Commission divulge to him, or his designated representative, the identity of such person or the substantive information, the Commission may do so after it has submitted its report to the President.

22 D.C. Reg. 6441, 6445-46 (May 19, 1976).

confused. If this practice persists, it is conceivable that a judge might be denied reappointment for conduct which only merits a reprimand. Arguably, Senator McClellan's tactics prejudiced Judge Halleck's renomination, interfered with the disciplinary proceeding, and virtually rendered the outcome moot.¹⁸⁹

This dilemma evolved because the Commission's inquiry was publicized.¹⁹⁰ To forestall similar situations from occurring, the Commission must strictly enforce its confidentiality rule. Criminal penalties in the form of fines and imprisonment could be imposed on participants who do not observe the regulations.¹⁹¹ Although these sanctions might not eliminate all breaches of the Commission's rules, they should serve to deter the disclosure of confidential information.

189. Actually, if Judge Halleck's accusations are true, Senator McClellan and the United States Attorney's office abused the Commission's regulations since all the participants were aware the proceeding was supposed to be secret. The following passage appeared in a motion which Judge Halleck filed in conjunction with his lawsuit:

On June 9, 1976, when the Commission received the complaint from Assistant United States Attorney Mueller, the Commission knew full well that the major source of opposition to Judge Halleck's reappointment to the Superior Court bench was the Office of the United States Attorney. According to the testimony of its special counsel upon trial of this case, the Commission had known since March, 1976, and of course knew on June 9 when the Mueller complaint was received, that the Office of the United States Attorney had sealed an agreement with one Paul Summit, a member of the staff of Senator John McClellan, then leading senatorial opponent of Judge Halleck's reappointment, to inform Summit of any inquiries from the Commission to the United States Attorney's office concerning Judge Halleck's reappointment. And the Commission, which is not composed of men of uncommon naivete, must have fully realized that the purpose of this arrangement was to use any such Commission inquiries as a device to justify blockage of Senate action on Judge Halleck's reappointment.

Plaintiff's Motion to Reopen and Receive Additional Evidence at 4-5, *Halleck v. Berliner*, 427 F. Supp. 1245 (D.D.C. 1977).

190. More recently, the *Post* disclosed the existence of a pending disciplinary investigation regarding Judge Robert H. Campbell of the District of Columbia Superior Court. *Wash. Post.*, April 12, 1978, § A at 1, col. 1. Although Judge Campbell is not facing reappointment, a premature exposure of the Commission's inquiry might unjustly damage the judge's reputation or impede the Commission's efforts. See notes 41-47 and accompanying text *supra*.

191. A recent Supreme Court decision, *Landmark Communications, Inc. v. Virginia*, 46 U.S.L.W. 4389 (May 1, 1978), is inapposite to this recommendation. In *Landmark*, the Court reversed the Virginia Supreme Court's determination that, pursuant to Va. Code § 2.137.13 (1950), criminal penalties could be levied against third parties, unconnected with confidential proceedings before the state's Judicial Inquiry and Review Commission, who accurately reported on Commission activities. Chief Justice Burger, joined by Justices White, Marshall, Blackmun, Rehnquist, and Stevens concluded that the interests advocated by the state did not counterbalance the infringement on free speech rights imposed by the statute. *But see* note 162 *supra*. The District of Columbia sanctions outlined above, however, apply to Commissioners, staff, members, and other persons affiliated with the Commission proceedings. The Court's opinion in *Landmark* does not prohibit the prosecution of people involved in the Commission's functions. The Court also

VI. CONCLUSION

The proliferation of judicial tenure agencies over the past eighteen years reflects a legislative effort to reconcile the supervision of judicial misconduct with the concept of judicial independence. Generally, the state plans provide more efficient and flexible alternatives to the traditional methods of disciplining judges.

The District of Columbia Commission on Judicial Disabilities and Tenure possesses considerable responsibility and power. Although the Tenure Commission has many of the characteristics believed necessary for an effective disciplinary body, it is still too early to predict its success. However, certain flaws, including the ambiguity of the Commission's exact authority and the absence of any means to enforce the privilege provisions, threaten to restrict its potential. While the Tenure Commission is regarded as an integral element of home rule, its status will not be fully realized until these problems are remedied.

Martha J. Tomich

indicated that a similar construction of the Virginia statute "might well save the statute from constitutional invalidity. . . ." 46 U.S.L.W. at 4391.